

A **GEORGE PATHMANATHAN MICHAEL GANDHI NATHAN
v. PORTCULLIS INTERNATIONAL LTD & ORS**

HIGH COURT MALAYA, KUALA LUMPUR
LIZA CHAN SOW KENG JC
B [ORIGINATING PETITION NO: D3(2)-26-50-2006]
20 FEBRUARY 2022

C **Abstract** – *It is incumbent upon an applicant to prove beyond reasonable doubt that an alleged contemnor had wilfully or deliberately disobeyed a court order. A court order will not be enforced by committal if its terms are vague or ambiguous. Any ambiguity and uncertainty must be resolved in favour of the alleged contemnor.*

D **CIVIL PROCEDURE:** *Committal proceedings – Application for – Payment of retained profits in company – Refusal to certify profits available for dividend distribution – Applicants obtained order to uplift and pay out sum held in deposit pursuant to consent order – Application to commit alleged contemnor to prison for contempt of court for alleged failure to comply with order – Whether alleged contemnor wilfully or deliberately disobeyed court order – Whether applicants proved beyond reasonable doubt that alleged contemnor committed contempt – Rules of Court 2012, O. 52 r. 6(3)*

F The petitioner held 25% of the shares of Portcullis Holdings (Malaysia) Sdn Bhd ('third respondent') while the second respondent, *vide* the first respondent, held the remainder 75%. The petitioner filed a petition at the High Court against the respondents, upon the allegation of minority oppression pursuant to s. 181 of the Companies Act 1965, in respect of the shares in the third respondent. The High Court held in favour of the petitioner and ordered that the first and second respondents transfer their 75% shareholding in the third respondent to the petitioner. The first and second respondents then applied for the determination of their entitlement to dividends from the retained profits of the third respondent but this was dismissed by the High Court. Upon appeal, however, the Court of Appeal ordered that the first and second respondents were entitled to 75% of the retained profits for dividend distribution from the cut-off date for share valuation up to the date of the transfer of shares to the petitioner ('COA order'). The first and second respondents then transferred their shares in the third respondent to the petitioner. Subsequent to the COA order, the parties entered into a consent order which provided for the mechanics of the payment out of the 75% of the retained profits in the third respondent. Messrs KBCF Tan ('KBCF') certified that the retained profits available for distribution was USD875,043 while Messrs Leong Siew Hoong & Co ('LSH') stated that the total retained profits for the third respondent was USD693,390. LSH, however, refused to certify the profits available for

dividend distribution and, pursuant to this, the petitioner took the position that he was no longer bound by the consent order. This led the first and second respondents to file for, *inter alia*: (i) an order to, *inter alia*, uplift and pay out the sum of USD656,282.25 held in the time deposit pursuant to the consent order ('encl. 198'); and (ii) for interest to be accumulated and accounted for and for 75% of the total certified sum of interest to be paid to the first and second respondents ('encl. 228'). The High Court decided encls. 198 and 228 in favour of the first and second respondents. In the present application, the first and second respondents applied to commit the petitioner to prison for contempt of court for alleged failure to comply with the encl. 198 order.

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Held (dismissing application):

- (1) A construction of encl. 198 and the consent order did not admit any room for doubt that the certification by LSH of the retained profits available for dividend distribution was required given the express wording employed in both orders. This view was fortified by the Court of Appeal in *George Pathmanathan Michael Gandhi Nathan & Anor v. Portcullis International Ltd & Anor And Other Appeals*. The first and second respondents sought to argue that there were clerical and grammatical errors in the Court of Appeal's grounds of judgment in para. 46 of the Court of Appeal's grounds of judgment. However, it was not open to them to advance such argument which overlooked what the Court of Appeal said in the rest of paras. 46, 48 and 50 of the grounds of judgment. These paragraphs, when read together, at the core, vaporised all doubts that certification by LSH was essential. (paras 30-32)
- (2) Whilst the complaint in the statement was of breach of cl. 1 of the encl. 198 order, in that, the petitioner had a distinct and separate obligation to release the sum of USD656,282.25, the contents of the whole order had to be read together. When the contents of the whole order were read, a pertinent factor to be appreciated was that, in para. 2 of the encl. 198 order, the court explicitly made a positive order for LSH to comply with the consent order forthwith to certify the retained profits available for dividend distribution. Indeed, the Court of Appeal, in para. 50 of its grounds of judgment, stated 'We were satisfied that the order of the High Court was mainly to compel LSH to comply with cl. 1 and cl. 4 of the consent order ...'. (para 33)
- (3) A careful scrutiny of the statement showed nowhere was it stated that the requirement of certification by LSH had been dispensed with. Order 52 r. 6(3) of the Rules of Court 2012 provides that, except with the leave of court hearing an application for an order of committal, no grounds shall be relied upon at the hearing except the grounds set out in the statement supporting the application. This omission in the statement to

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- A state that the requirement of certification by LSH had been dispensed with utterly destroyed the first and second respondents' own case. Both the encl. 198 order and the consent order, as interpreted by the Court of Appeal, meant that the requirement of certification by LSH was necessary. Therefore, para. 10 of the statement filed pursuant to O. 52
- B r. 3(2) of the ROC was unsustainable. (paras 37 & 38)
- (4) Who should be fastened with the obligation to ensure LSH's certification? It was apposite that the terms of the order be looked at in order to define the obligations imposed by it. Both orders, when examined, were however deafeningly silent on who was to ensure LSH
- C complied with the requirement of certification. As the standard of proof in committal proceedings is proof beyond reasonable doubt, any ambiguity and uncertainty must be resolved in favour of the alleged contemnor. It could not be said, in good conscience and with equanimity, that the first and second respondents had proven beyond
- D reasonable doubt that the petitioner committed contempt, as alleged. The committal application by the first and second respondents must fail. (paras 39, 40 & 48)

Case(s) referred to:

- Abdol Mulok Awang Damit v. Perdana Industri Holdings Bhd* [2003] 3 CLJ 497 CA (refd)
- E *Dato' Seri Yusof Dato' Biji Sura v. BTM Timber Industries Sdn Bhd & Ors* [2009] 5 CLJ 412 CA (refd)
- George Pathmanathan Michael Gandhi Nathan & Anor v. Portcullis International Ltd & Anor And Other Appeals* [2019] 1 LNS 782 CA (refd)
- Inter Heritage (M) Sdn Bhd v. ASA Sports Sdn Bhd* [2009] 2 CLJ 221 CA (refd)
- F *Lee Lim Huat v. Yusuf Khan Ghows Khan & Anor* [1997] 3 CLJ 197 CA (refd)
- Mah Siew Keong v. Bayu Gamitan Sdn Bhd & Other Appeals* [2002] 1 CLJ 695 CA (refd)
- MediaCorp News Pte Ltd & Ors v. MediaBanc (Johor Bharu) Sdn Bhd & Ors; Lim Leong Wuoh & Ors (Proposed Contemnors)* [2011] 5 CLJ 454 HC (refd)
- Monatech (M) Sdn Bhd v. Jasa Keramat Sdn Bhd* [2002] 4 CLJ 401 FC (refd)
- Tan Kang Ho v. Mao Sheng Marketing (M) Sdn Bhd & Ors* [2015] 4 CLJ 113 HC (refd)
- G *Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors* [2012] 2 CLJ 849 FC (refd)
- Wee Choo Keong v. MBf Holdings Bhd & Anor And Another Appeal* [1993] 3 CLJ 210 SC (refd)
- Wee Choo Keong; Hounng Hai Hong & Anor v. MBf Holdings Bhd & Anor & Other Appeals* [1995] 4 CLJ 427 SC (refd)
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Legislation referred to:

- Companies Act 1965, s. 181
Rules of Court 2012, O. 52 rr. 3(2), 6(3)
- For the petitioner - Suaran Singh; M/s Law Partnership*
- I *For the respondents - Anantha Krishnan; M/s Anantha Krishnan*
- Reported by Najib Tamby*

JUDGMENT

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Liza Chan Sow Keng JC:**Introduction**

[1] The application by the first and second respondents (interchangeably referred to as “applicants”) in enclosure (“encl.”) 264 is to commit the petitioner to prison for contempt of court for alleged failure to comply with the terms of an order of court dated 23 May 2018 (encl. 198) to uplift a sum of USD656,282.25 from a time deposit, and forthwith pay the said amount to the applicants.

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[2] After having read the cause papers, considered the written as well as oral submissions by the parties, I dismissed the committal application and gave brief oral grounds of decision. The applicants have appealed against my decision. This judgment contains the full reasons for my decision.

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Background Facts

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[3] The petitioner held 25% of the shares of the third respondent. The second respondent *vide* the first respondent held the remainder 75% shares of the third respondent.

[4] The petitioner *vide* this petition filed in 2006 initiated a minority oppression action under s. 181 of the Companies Act 1965 against the respondents in respect of the shares in the third respondent company.

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[5] After a full trial, the High Court found in favour of the petitioner on 29 July 2011 and ordered that the first and second respondents transfer their 75% shareholding in the third respondent to the petitioner. This decision was affirmed on 14 August 2013 by the Court of Appeal, and the application by the first and second respondents for leave to appeal to the Federal Court was dismissed on 29 January 2014.

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[6] An application *vide* encl. 148 was made by the first and second respondents to determine their entitlement to dividends from the retained profits of the third respondent which was dismissed by the High Court but allowed by the Court of Appeal on 27 January 2015. The Court of Appeal ordered that the first and the second respondents are entitled to 75% of the retained profits for dividend distribution from 29 July 2011 (being the cut-off date for share valuation) up to the date of the transfer of shares to the petitioner. On 30 January 2015, the first and second respondents transferred their shares in the third respondent to the petitioner.

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[7] Subsequent to the above Court of Appeal order, on 8 September 2015, the parties entered into a consent order, providing for the mechanics of the payment out of the 75% of the retained profits in the third respondent for the period of 29 July 2011 to 30 January 2015.

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A [8] The relevant terms of the consent order for ease of reference are produced:

- B 1. Messrs Leong Siew Hoong & Co., auditors for the 3rd Respondent, certify and finalise within a period of 30 days from the date of this order, the retained profits available for dividend distribution from 29.7.2011 to 30.1.2015, after having first provided the indicative amount to be certified to the Petitioner and the Respondents for their comments (if any);
- C 2. Messrs KBCF Tan, Labuan, the auditors for 3rd Respondent, certify and finalise within a period of 14 days from the date of this order, the retained profits available for dividend distribution for the 3rd Respondent from 29.7.2011 up to 30.1.2015 after having first provided the indicative amount to be certified to the Petitioner and the Respondents for their comments (if any);
- D 3. Portcullis Trustnet (Labuan) Ltd will place an amount no less than the sum of US\$695,000.00 which is free from encumbrances in a time deposit account and a copy of the time deposit slip is to be forwarded to the Respondents;
- E 4. The Petitioner who is the sole signatory to the account of Portcullis Trustnet (Labuan) Ltd hereby gives the following undertaking:
 - F a. That the amount of US\$695,000.00 will remain in the time deposit account and upon maturity, will ensure that the time deposit is rolled over to the next maturity date and the sum of US\$695,000.00 will not be uplifted until disposal of the Petitioner's application for leave to appeal to the Federal Court and if applicable, until the disposal of the substantive appeal;
 - G b. That in the event the Petitioner is successful in the application for leave to appeal to the Federal Court and subsequently in the substantive appeal, the time deposit will be uplifted and if the 1st and 2nd Respondents are successful, *the undertaking continues until the dividend distribution for the period 29.7.2011 - 30.1.2015 is determined by Messrs Leong Siew Hoong & Co and Messrs KBCF Tan* and upon such certification, the time deposit will be uplifted and 75% of the certified amount would accordingly be paid within fourteen (14) days from the date of the certification.
(emphasis added)

H [9] The petitioner's application for leave to appeal to the Federal Court was dismissed on 20 September 2016. The Federal Court on 22 November 2016 dismissed the petitioner's motion to review the 20 September 2016 decision.

I [10] On 7 April 2016, Messrs KBCF Tan ("KBCF"), certified that the retained profits available for distribution was USD875,043 in respect of PTNLL.

[11] Messrs Leong Siew Hoong & Co (“LSH”) by letter dated 9 December 2016 stated that the total retained profits of the third respondent between 29 July 2011 to 30 January 2015 was USD693,390.29. LSH however refused to certify the profits available for dividend distribution and took the position that it is “a matter for the Board of Directors of the relevant companies to decide”. A B

[12] Given LSH’s refusal to certify the amount of profits available for distribution, the petitioner took the position that he was no longer bound by the consent order. This leads the first and second respondents to file:

- (i) enclosure 198 on 27 January 2017 for an order to *inter alia* uplift and pay out the sum of USD656,282.25 (*ie*, 75% of the total certified sum of USD875,043), which was being held in the time deposit pursuant to the consent order; C
- (ii) enclosure 228 for interest to be accumulated and accounted for and for 75% of the total certified sum of interest, to be paid to the first and second respondents; D
- (iii) an application for and successfully obtaining an *inter partes Mareva* injunction on 24 February 2017 against the petitioner, Portcullis Labuan and the third respondent from, among others:
 - (a) restraining them from uplifting, transferring, disposing, removing and/or dissipating the monies totalling USD821,034.09 held in time deposit accounts maintained by Portcullis Labuan, until the first and second respondents’ application for payment of retained profits in encl. 198 is heard and disposed; and E
 - (b) restraining them from making any payments of the monies to themselves and/or their servants, agents, and any other party except with the express authority of the High Court until encl. 198 is heard and disposed of. F

[13] The petitioner filed an application in encl. 233 to set aside the *Mareva* injunction. G

[14] The High Court on 23 May 2018 decided encls. 198, 228 and 233 all in favour of the first and second respondents and further extended the *Mareva* Order as follows:

- 2. Suatu perintah untuk menghalang Pempetisyen, Portcullis Trustnet (Labuan) Ltd dan Responden Ketiga sama ada melalui mereka sendiri atau melalui pengarah-pengarah, pegawai-pegawai, penama-penama, atau ejen-ejen mereka barang siapa daripada mengeluarkan, memindah, menghapus, memindah dan/atau menyusutkan wang berjumlah USD821,034.09 (menurut kepada Penyata Akaun bertarikh 08.07.2016 (“Wang tersebut”) yang disimpan di dalam deposit masa oleh Portcullis H I

- A Trustnet (Labuan) Ltd dalam menjalankan Perintah Persetujuan bertarikh 23.5.2018 (Kandungan 198 dan Kandungan 228) dibayar kepada Responden-Responden Pertama dan Kedua;
- B 3. Suatu perintah untuk menghalang Pempetisyen, Portcullis Trustnet (Labuan) Ltd dan Responden Ketiga sama ada melalui mereka sendiri atau melalui pengarah-pengarah, pegawai-pegawai, penama-penama, atau ejen-ejen mereka barang siapa daripada memasuki sebarang transaksi, urusan atau perjanjian yang berkaitan dengan Wang tersebut sehingga jumlah-jumlah di bawah perintah-perintah Mahkamah bertarikh 23.5.2018 (Kandungan 198 dan Kandungan 228) dibayar kepada Responden-Responden Pertama dan Kedua;
- C 4. Suatu perintah untuk menghalang Pempetisyen, Portcullis Trustnet (Labuan) Ltd dan Responden Ketiga sama ada melalui mereka sendiri atau melalui pengarah-pengarah, pegawai-pegawai, penama-penama, atau ejen-ejen mereka barang siapa daripada membuat sebarang pembayaran daripada Wang tersebut kepada Pempetisyen atau Responden Ketiga dan/atau pekerja-pekerja, agen-agen atau mana-mana pihak kecuali dengan kuasa nyata oleh Mahkamah Yang Mulia ini sehingga jumlah-jumlah di bawah perintah-perintah Mahkamah bertarikh 23.5.2018 (Kandungan 198 dan Kandungan 228) dibayar kepada Responden-Responden Pertama dan Kedua ...
- E [15] The petitioner appealed against the High Court orders made in respect of encls. 198, 228 and 233 to the Court of Appeal. All three appeals were dismissed by the Court of Appeal on 25 June 2019.
- F [16] The petitioner then sought leave to appeal to the Federal Court in respect of encls. 198 and 228 only (and not encl. 233) but to no avail. The motion for leave was dismissed by the Federal Court on 6 January 2020.
- [17] As the committal application by the first and second respondents is premised on breach of encl. 198, it is produced for ease of reference. The order of the High Court dated 23 May 2018 in encl. 198 reads:
- G 1. That the 75% of the total retained profits certified by Messrs KBCF Tan for Portcullis Trustnet (Labuan) Ltd for the period 29.7.2011 to 30.1.2015 in the sum of USD656,282.25 (*ie*, 75% of the total certified sum of USD875,043.00) be uplifted from the time deposit and be forthwith paid out to the 1st and/or 2nd Respondents pursuant to Clause 4(b) of the Consent Order dated 8.9.2015 (the "Consent Order");
- H 2. That Messrs Leong Siew Hoong & Co forthwith comply with Clauses 1 and 4(b) of the Consent Order and certify the retained profits available for dividend distribution from 29.7.2011 to 30.1.2015 for the 3rd Respondent and its subsidiaries save for Portcullis Trustnet (Labuan) Ltd;
- I 3. That upon final certification by Leong Siew Hoong & Co, 75% of the certified retained profits for the period 29.7.2011 to 30.1.2015 for the 3rd Respondent and its subsidiaries save Portcullis Trustnet (Labuan) Ltd, shall be paid to the 1st and/or 2nd Respondent ...

[18] Leave to commence committal proceedings was granted to the applicants by the High Court on 23 June 2020 pursuant to O. 52 r. 3 of the Rules of Court 2012 (“ROC 2012”). A

The Law

[19] The power to punish for contempt has been set out by the Federal Court in *Tan Sri Dato’ (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors* [2012] 2 CLJ 849; [2012] 3 MLJ 458, where Arifin Zakaria CJ explained: B

[21] The jurisprudence for arming the court with the power to punish a contempt is best expounded by Brown J in *Re HE Kingdon v. SC Goho* [1948] MLJ 17 as follows: C

But the root principle on which this inherent power to punish for contempt is founded, the purpose for which it must be exercised, is not to vindicate the dignity of the individual judge or other judicial officer of a court or even of the court itself, but to prevent an undue interference with the administration of justice in the public interest. D

[22] Hence, the power to punish a contempt is not derived merely from statute nor truly from common law but instead flows from the very concept of a court of law (see *Borrie & Lowe’s The Law of Contempt* (3rd Ed), at p 465; and *Master Jacob* (1970) 23 Current Legal Problems 23). E

[23] Article 126 of the Federal Constitution empowers the Federal Court, the Court of Appeal and the High Courts to punish any contempt of itself. This is repeated in s. 13 of the Court of Judicature Act 1964. However since the RFC has no procedural provision on committal, therefore, by virtue of r. 3 of the RFC, the procedure under O. 52 of the RHC may be adopted. Thus, an applicant can bring contempt proceedings via O. 52 of the RHC without having to go through the Criminal Procedure Code or the Penal Code even if the relief sought is imprisonment (see *Chandra Sri Ram v. Murray Hiebert* [1997] 3 MLJ 240; *Arthur Lee Meng Kwang v. Faber Merlin Malaysia Bhd & Ors* [1986] 2 MLJ 193 and *Chung Onn v. Wee Tian Peng* [1996] 5 MLJ 521). F

[20] As to what is contempt, the Federal Court in *Monatech (M) Sdn Bhd v. Jasa Keramat Sdn Bhd* [2002] 4 CLJ 401; [2002] 4 MLJ 241 speaking through Haidar Mohd Noor FCJ held that contempt of court is interference with the due administration of justice and further held that the categories of contempt are not closed never closed. G

[21] Ten years later, in the case of *Tan Sri Dato’ (Dr) Rozali Ismail (supra)*, Arifin Zakaria CJ explained: H

Contempt has been reclassified either as (1) a specific conduct of contempt for breach of a particular court order; or (2) a more general conduct for interfering with the due administration or the course of justice. This classification is better explained in the words of Sir Donaldson MR in *Attorney-General v. Newspaper Publishing Plc*, at p 362: I

- A Of greater assistance is the reclassification as (a) conduct which involves a breach, or assisting in the breach, of a court order; and (b) any other conduct which involves an interference with the due administration of justice, either in a particular case or, more generally, as a continuing process, the first category being a special form of the latter, such inference being a characteristic common to
- B all contempts per Lord Diplock in *Attorney-General v. Leveller Magazine Ltd* [1979] AC 440 at p 449.

[22] It is also settled law that contempt proceedings are criminal in nature because they involve the liberty of the alleged contemnor and as such, has to be proven beyond a reasonable doubt. Arifin Zakaria CJ in *Tan Sri Dato' (Dr) Rozali Ismail (supra)* went on to say:

- C [29] It is settled law that committal proceedings is criminal in nature since it involves the liberty of the alleged contemnor. Premised upon that, the law has provided procedural safeguards in committal proceeding which requires strict compliance. In this regard, Cross J in *Re B (JA) (An Infant)* [1965] Ch 1112 had this to say:
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Committal is a very serious matter. The courts must proceed very carefully before they make an order to commit to prison; and rules have been laid down to secure that the alleged contemnor knows clearly what is being alleged against him and has every opportunity to meet the allegations. For example, it is provided that there must be personal service of the motion on him even though he appears by solicitors, and that the notice of motion must set out the grounds on which he is said to be in contempt; further, he must be served as well as with the motion, with the affidavits which constitute the evidence in support of it.

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- F It is clear that if safeguards such as these have not been observed in any particular case, then the process is defective even though in the particular case no harm may have been done. For example, if the notice has not been personally served the fact that the respondent knows all about it, and indeed attends the hearing of the motion, makes no difference. In the same way, as is shown by
- G *Taylor v. Roe*, if the notice of motion does not give the grounds of the alleged contempt or the affidavits are not served at the same time as the notice of motion, that is a fatal defect, even though the defendants gets to know everything before the motion comes on, and indeed answers the affidavits.

- H When, however, one passes away from safeguards which are laid down in the interests of the contemnor and comes to consider mere verbal deficiencies in the documents in question – cases where the documents do not comply strictly with the rules, but it is impossible that in any conceivable case the contemnor could be
- I in any way prejudiced by the defects – then it seems to me that there is no reason why the courts should be any slower to waive such technical irregularities in a committal proceeding than they would in any other proceeding.

[30] In similar tone, Lord Denning MR in *McIlraith v. Grady* [1968] 1 QB 468 said at p 477:

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The second appeal is as to the committal order. Here we must remember the fundamental principle that no man's liberty is to be taken away unless every requirement of the law has been strictly complied with.

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[31] Later, in *Re Bramblevale Ltd* [1970] 1 Ch 125, Lord Denning MR reaffirmed the same and had this to say:

A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond reasonable doubt (see Lord Denning MR in at p 137).

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[23] It is thus incumbent upon the applicants to prove beyond a reasonable doubt that the petitioner had wilfully or deliberately disobeyed or disregarded the encl. 198 order. In the case of *MediaCorp News Pte Ltd & Ors v. MediaBanc (Johor Bharu) Sdn Bhd & Ors; Lim Leong Wuoh & Ors (Proposed Contemnors)* [2011] 5 CLJ 454; [2010] 5 MLJ 562, Azahar Mohamed J (now CJM) emphasised the same point thus:

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I should note at once that it is settled law that in order to sustain a conviction in contempt proceedings, the standard of proof required is one beyond a reasonable doubt. Therefore, it is incumbent upon the applicants to prove beyond a reasonable doubt that the person asked to be committed, namely the proposed contempt parties had wilfully, deliberately disobeying, or disregarding the order of the court. The authority to support this proposition is to be found in the judgment of Lee Hun Hoe CJ (Borneo) in *TO Thomas v. Asia Fishing Industry Pte Ltd* [1974] 1 LNS 163; [1977] 1 MLJ 151. There, His Lordship had this to say at p. 155 of the report:

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Wilfully, disobeying an order of the court constituted contempt. This commonly consists in a party's doing otherwise than he is enjoined to do, or not doing what he is commanded or required to do by the process, order or decree of the court: *Miller v. Knox*. The contempt must be wilful. An order of court must have been contumaciously disregarded. It is no good if it is casual, accidental and unintentional: *Fairclough & Sons v. Manchester Ship Canal Co (No 2)*.

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[24] A court order will not be enforced by committal if its terms are vague or ambiguous, the rule being analogous to that which governs the interpretation of penal statutes – *Dato' Seri Yusof Dato' Biji Sura v. BTM Timber Industries Sdn Bhd & Ors* [2009] 5 CLJ 412; [2010] 1 MLJ 644, CA.

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The Parties' Positions

[25] In the applicants' statement filed pursuant to O. 52 r. 3(2) ROC 2012, the acts of contempt alleged to have been committed are as contained in paras. 4 to 10 of the statement. The applicants' complaints were:

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- A (i) in accordance with the consent order, the petitioner's solicitors in a letter dated 5 October 2015 had confirmed that a sum of USD817,140.54 had been deposited in time deposit pending disposal of the petitioner's leave application to appeal at the Federal Court;
- B (ii) on 20 September 2016, the Federal Court had dismissed the petitioner's leave application for leave to appeal. Despite that, the petitioner did not pay out the money in time deposit to the respondents as stated in the consent order dated 8 September 2015;
- C (iii) as such, the first and second respondents filed an application *vide* encl. 198 in court on 27 January 2017 and on 23 May 2018, the court ordered as follows:
- ... 1 That the 75% of the total retained profits certified by Messrs KBCF Tan for Portcullis Trustnet (Labuan) Ltd for the period 29.7.2011 to 30.1.2015 in the sum of USD656,282.25 (*ie*, 75% of the total certified sum of USD875,043.00) be uplifted from the time deposit and be forthwith paid out to the 1st and/or 2nd Respondents pursuant to Clause 4(b) of the Consent Order dated 8.9.2015 (the "Consent Order");
- D (iv) the order in encl. 198 contained a penal clause and was served personally on the petitioner at his office address on 10 September 2019;
- E (v) the petitioner unsuccessfully appealed to the Court of Appeal against the order in encl. 198. The petitioner subsequently sought leave to appeal from the Federal Court which was dismissed on 6 January 2020;
- F (vi) the order dated 23 May 2018 in encl. 198 is valid and binding till now, but the petitioner had failed to abide by the order to uplift the sum of USD656,282.25 from the time deposit and to forthwith pay the amount to the first and second respondents; and
- G (vii) the petitioner's refusal, failure and non-compliance and/or failure to comply with the terms of the order dated 23 May 2018 in encl. 198 is intentional and amount to interference with and calculated to interfere with the proper administration of justice where the order in encl. 198 was not complied with and was completely ignored.
- [26] The petitioner in essence took the position that:
- H (i) there is no certification by LSH:
- (a) paragraph 1 of the encl. 198 order clearly provides that the distribution of the profits of Portcullis Trustnet (Labuan) Ltd. is pursuant to, and therefore subject to cl. 4(b) of the consent order. Clause 4(b) of the consent order states:
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- That in the event the Petitioner is successful in the application for leave to appeal to the Federal Court and subsequently in the substantive appeal, the time deposit will be uplifted and if the 1st and 2nd Respondents are successful, *the undertaking continues until the dividend distribution for the period 29.7.2011-30.1.2015 is determined by Messrs Leong Siew Hoong & Co and Messrs KBCF Tan* and upon such certification, the time deposit will be uplifted *and 75% of the certified amount would accordingly be paid within fourteen (14) days from the date of the certification.* (emphasis added)
- (b) a reading of para. 1 of the encl. 198 order together with cl. 4(b) of the consent order makes it abundantly clear that:
- (1) before any payment of dividends can be made to R1 and/or R2 out of the time deposit account of Portcullis Trustnet (Labuan) Ltd;
 - (2) certification by LSH of the retained profits available for dividend distribution is still required; and
 - (3) certification by KBCF Tan alone is insufficient.
- (c) this interpretation of the encl. 198 order is supported by the Court of Appeal's grounds of judgment (in respect of the appeal against the encl. 198 order) set out in the case of *George Pathmanathan Michael Gandhi Nathan & Anor v. Portcullis International Ltd & Anor And Other Appeals* [2019] 1 LNS 782; [2019] MLJU 496;
- (d) the certification of such profits was left at the hands of the two independent auditors, LSH and KBCF Tan, and not the petitioner. This was later transposed in the encl. 198 order where the said order once again insists that LSH performs its obligations under the consent order to certify the profits of the third respondent;
- (e) in the absence of the necessary certification by LSH, any payment of dividends out of the time deposit account is a breach of the consent order and/or the encl. 198 order by the petitioner;
- (f) any step to compel certification by LSH must therefore be placed on the first and second respondents;
- (ii) the encl. 198 order is a precarious order:
- (a) one cannot be held in contempt of court for not complying with a precarious court order – *Tan Kang Ho v. Mao Sheng Marketing (M) Sdn Bhd & Ors* [2015] 4 CLJ 113; *Mah Siew Keong v. Bayu Gamitan Sdn Bhd & Other Appeals* [2002] 1 CLJ 695; [2002] 2 MLJ 107, at p. 109, CA; *Inter Heritage (M) Sdn Bhd v. ASA Sports Sdn Bhd* [2009] 2 CLJ 221;

- A (b) there is nothing expressed in para. 1 of the encl. 198 order and cl. 4(b) of the consent order which specifically require the petitioner to compel performance of LSH to certify the profits of the third respondent;
- B (iii) due to the *Mareva* injunction obtained by the first and second respondents over the time deposit account and maintained by way of the encl. 233 order, the bank has notified the petitioner that the upliftment request could not be proceeded with and due notification was given to the first and second respondents *via* their solicitors; the recourse lies with first and second respondents themselves to apply to the High Court to vary/set aside the *Mareva* injunction obtained by them, instead of compelling the petitioner to facilitate the release of the sum in breach of the *Mareva* injunction;
- C (iv) the first and second respondents have not exhausted all other reasonable avenues open to them before resorting to file this committal application against the petitioner when they have the following options, among others:
- D (a) proceeding with legal action against LSH to secure their compliance with the consent order and the encl. 198 order;
- E (b) proceeding with the relevant applications to vary/set aside the *Mareva* injunction which has created a bar over the time deposit account wherein the funds are held; and
- F (c) seek clarification before the court on the manner in which the encl. 198 order should be proceeded with in light of the failure of LSH to certify the profits as required under the consent order and the encl. 198 order.

Findings

- G [27] I begin by referring to the Court of Appeal case of *Lee Lim Huat v. Yusuf Khan Ghows Khan & Anor* [1997] 3 CLJ 197; [1997] 2 MLJ 472 which held that the evidence, when considered in its totality must establish beyond reasonable doubt the guilt of the alleged contemnor.

- H [28] In the instant case, as it is clear that the committal proceedings are concerned with the alleged failure by the petitioner to comply with the encl. 198 order, which order in turn refers to the consent order, it is necessary to examine closely the precise nature and ambit of the encl. 198 order which the petitioner is alleged to have been in breach of, as well as the terms of the consent order.

I *The Requirement Of Certification By LSH*

- [29] It is common ground that LSH has not certified the profits available for dividend distribution.

[30] Upon examination of the encl. 198 order as well as the consent order, firstly, it is amply clear that a construction of both orders do not admit any room for doubt that certification by LSH of the retained profits available for dividend distribution is required given the express wording employed in both orders. This view is fortified by the Court of Appeal in *George Pathmanathan Michael Gandhi Nathan & Anor v. Portcullis International Ltd & Anor And Other Appeals* [2019] 1 LNS 782; [2019] MLJU 496. It is fitting that I reproduce the salient passages from the judgment:

[46] ... paragraph 1 of the High Court Order only stated that 75% of the total retained profits certified by LSH for Portcullis Trust Net (Labuan) Ltd for the period 29.7.2011 to 30.1.2015 in the sum of USD656,282.25 (ie, 75% of the total certified sum of USD875,043.00) be uplifted from the time deposit and be forthwith paid out to the 1st and/or 2nd Respondents pursuant to Clause 4(b) of the Consent Order dated 8.9.2015. *Therefore, paragraph 1 does not say the sum of USD656,282.25 be paid by Portcullis Labuan but pursuant to Clause 4(b) of the Consent Order which means that payment of money out is still subject to certification from LSH.* Clause 4(b) clearly says that:

the undertaking continues until the *dividend distribution for the period 29.7.2011 - 30.1.2015 is determined by Messrs Leong Siew Hoang & Co and Messrs KBCF Tan and upon such certification, the time deposit will be uplifted and 75% of the certified amount would accordingly be paid within fourteen (14) days from the date of the certification.*

...

[48] We also found that there is no basis for the Appellant to contend that the High Court ordered 75% of the certified retained profits from Portcullis Malaysia and its subsidiaries (save for Portcullis Labuan) to be paid to 1st and 2nd Respondents. The Order clearly states that 75% of the certified retained profits from the period 29.7.2011 to 30.1.2015 for the 3rd Respondent (2nd Appellant) and its subsidiaries save Portcullis Trust Net (Labuan) Ltd, shall be paid to the 1st and /or 2nd Respondents. *The clear word is that payment is subject to final certification by LSH. The High Court Order is consistent with the terms of the Consent Order.*

...

[50] We were satisfied that the Order of the High Court was mainly to compel LSH to comply with Clause 1 and Clause 4(b) of the Consent Order dated 8.9.2015 *and upon final certification by LSH, 75% of the retained profits for the period 29.7.2011 to 30.1.2015 for the 2nd Appellant and its subsidiaries save Portcullis Trust Net (Labuan) Ltd, shall be paid to the 1st and 2nd Respondent. The High Court Order is consistent with the Consent Order dated 8.9.2015.* (emphasis added)

[31] Given the aforesaid, first and second respondents sought to argue that there were clerical and grammatical errors in para. 46 of the Court of Appeal's grounds of judgment and para. 46 should instead read:

A ... [46] However, we found there is no merit in the argument because paragraph 1 of the High Court Order only stated that 75% of the total retained profits certified by LSH (**a clerical error which ought to actually read KBCF Tan**) for Portcullis Trust Net (Labuan) Ltd for the period 29.7.2011 to 30.1.2015 in the sum of USD 656,282.25 (*ie*, 75% of the total certified sum of USD875,043.00) be uplifted from the time deposit and be
B forthwith paid out to the 1st and/or 2nd Respondents pursuant to Clause 4(b) of the Consent Order dated 8.9.2015. Therefore, paragraph 1 does not say the sum of USD656,282.25 be paid by Portcullis Labuan but pursuant to Clause 4(b) of the Consent Order (**,**) which means that payment of money out is still subject to certification from LSH ...” (clerical error in bold and brackets posited by 1st and 2nd Respondents).
C (emphasis added)

[32] With utmost respect to the first and second respondents’ counsel, I do not think it is open to them to advance such an argument which overlooked what the Court of Appeal said in the rest of paras. 46, 48 and 50 of the grounds of judgment. These paragraphs when read together, at the core, vaporised all doubts that certification by LSH is essential.
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[33] Secondly, whilst the complaint in the statement is of breach of cl. 1 of the encl. 198 order in that the petitioner has a distinct and separate obligation to release the sum of USD656,282.25 (*ie*, 75% of the total certified sum of USD875,043), in my view, the contents of whole order have to be read together. When the contents of the whole order are read, a pertinent factor to be appreciated is that in para. 2 of the encl. 198 order, the court had explicitly made a positive order for LSH to comply with the consent order forthwith to certify the retained profits available for dividend distribution for the period 29 July 2011 to 30 January 2015. Indeed the Court of Appeal in para. 50 of its grounds of judgment stated “We were satisfied that the order of the High Court was mainly to compel LSH to comply with cl. 1 and cl. 4(b) of the consent order dated 8 September 2015 ...”.
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[34] At this juncture, it ought to be mentioned that the first and second respondents had also taken the position that even if certification by LSH is necessary, the first and second respondents at para. 5.1 to 5.14 of their submissions and in their affidavit in support of leave particularly at paras. 50 to 57 and the exhibits annexed thereto contended that the parties had arrived at an agreement to waive the requirement of certification by LSH. However, the petitioner maintained that these documents were “without prejudice” communications.
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[35] To digress a little, after the notice to show cause dated 15 January 2020 was sent to the petitioner, he ought to have availed himself of the opportunity to explain himself at the earliest. He is not “a baby in the woods” nor a ‘country yokel’ a term used in *Abdol Mulok Awang Damit*
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v. Perdana Industri Holdings Bhd [2003] 3 CLJ 497 at p. 502 as he is an advocate and solicitor. His new solicitors, however, did respond a month later on 14 February 2020. It ought to be noted that on 21 January 2020, the petitioner's own erstwhile solicitors sought confirmation that requirement for LSH's certification had been waived in order to release the money and sought details of the applicants' solicitors' bank account details. The applicants' solicitors responded the next day on 22 January 2020 to say there was no such need and, in any case waived the requirement and provided the banking details. The petitioner's erstwhile solicitors on 24 January 2020 then *inter alia* informed that the petitioner had instructed the bank to uplift the time deposit. The letter dated 23 January 2020 signed by the petitioner in fact asked the bank to release money into Portcullis Trustnet (Labuan) Ltd's account as opposed to transfer to the applicants' solicitor's account. This was of course rejected by the bank. The applicants' solicitors then issued a letter dated 10 February 2020 informing the petitioner's solicitors that the bank was awaiting the petitioner's written instruction to confirm the contents of the applicants' solicitors' letter dated 30 January 2020 requesting to release the sum of USD656,282.25 to the applicants' solicitors' account. On 11 February 2020, the petitioner changed his solicitors and in a *volte face*, by letter to the bank dated 17 February 2020, the current solicitors informed the bank that parties had not arrived "at a mutually accepted sum to be paid under the orders" and that under the injunction in encl. 233, the monies in the time deposit "shall be uplifted upon payment of the sums ascertained" under encls. 198 and 228.

[36] In my respectful view, even if certification of LSH is necessary, the parties had agreed to waive it. I do not agree that there was no concluded agreement that this requirement of certification by LSH was waived based on the legal principle of estoppel operating to prevent the petitioner from contending otherwise due to the events in the preceding paragraph. As such, the correspondences are admissible.

[37] However, I have doubts whether the first and second respondents are entitled to advance, for purpose of the committal application the argument that this requirement of certification by LSH is waived for reasons that firstly, the statement filed pursuant to O. 52 r. 3(2) is the document that gives the facts particularising the nature of the alleged contempt, the grounds on which committal is sought against the alleged contemnor and the court order that was said to have been breached. The affidavit filed is to verify the accuracy of the statement. A careful scrutiny of the statement shows nowhere is it stated that the requirement of certification by LSH has been dispensed with. Order 52 r. 6(3) ROC 2012 provides that except with leave of the court hearing an application for an order of committal, no grounds shall be relied upon at the hearing except the grounds set out in the statement supporting the application. This omission in the statement to state that the requirement

A of certification by LSH has been dispensed with in my respectful view utterly destroyed the first and second respondents' own case. In this regard, reference is made to *Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors* (*supra*) where the Federal Court stated:

B [37] We wish to state in clear term that the alleged act of contempt must be adequately described and particularised in detail in the statement itself. **The accompanying affidavit is only to verify the facts relied in that statement. It cannot add facts to it. Any deficiency in the statement cannot be supplemented or cured by any further affidavit at a later time.** The alleged contemnor must at once be given full knowledge of what charge he is facing so as to enable him to meet the charge. This must be done within the four walls of the statement itself. The same approach was taken by the Supreme Court in *Arthur Lee Meng Kwang* case (see also *Syarikat M Mohamed v. Mahindapal Singh & Ors* [1991] 2 MLJ 112).

(emphasis added)

D [38] With the omission in the statement to state that the requirement of certification by LSH has been dispensed, in my view, as things currently stand, both the encl. 198 order as well as the consent order as interpreted by the Court of Appeal, mean the requirement of certification by LSH is necessary. On this basis, I am of the utmost respectful view that para. 10 of the statement filed pursuant to O. 52 r. 3(2) ROC 2012 is unsustainable.

E *Ambiguity In The Encl. 198 Order And Consent Order – Who Is To Ensure Compliance By LSH*

F [39] Flowing from the preceding paragraph, on the basis that certification by LSH is still required, on who should be fastened the obligation to ensure LSH's certification? Again, it is apposite that the terms of the order be looked at in order to define the obligations imposed by it. Both orders when examined are however deafeningly silent on who is to ensure LSH complies with the requirement of certification. It bears repetition that it is not disputed that that LSH's certification has not been achieved. As the standard of proof in committal proceedings is proof beyond reasonable doubt, any ambiguity and uncertainty must be resolved in favour of the alleged contemnor (see the Supreme Court decision in *Wee Choo Keong; Houngh Hai Hong & Anor v. MBf Holdings Bhd & Anor & Other Appeals* [1995] 4 CLJ 427; *Mah Siew Keong v. Bayu Gamitan Sdn Bhd & Other Appeals* [2002] 1 CLJ 695; [2002] 2 MLJ 107, CA; *Dato' Seri Yusof Dato' Biji Sura v. BTM Timber Industries Sdn Bhd & Ors* [2009] 5 CLJ 412; [2010] 1 MLJ 644, CA).

H [40] That being the case, this court cannot in all good conscience say with equanimity that the first and second respondents had proven beyond a reasonable doubt that the petitioner had committed contempt as alleged.

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The Elephant In The Room – The Mareva Order In Encl. 233

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[41] Assuming that I am wrong on the first two issues, the *Mareva* order made pursuant to encl. 233 in para. 4 explicitly provides “An order to restrain the petitioner, Portcullis Trustnet (Labuan) Ltd and the third respondent either through themselves or through their directors, officers, nominees or agents from making any payment out of the money to petitioner or third respondent and/or employees, agents or any party except by express authority by this Honourable Court until the amounts under the orders of the court dated 23 May 2018 (encl. 198 and encl. 228) are paid to the first and second respondents”. Paragraphs 2 and 3 of the *Mareva* order also envisage the funds to be paid only to the first and second respondents.

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[42] The bank has notified the petitioner that the request to uplift the funds could not be proceeded with due to the *Mareva* order. The first and second respondents’ solicitors, have by letter dated 31 January 2020 written to the bank for the release of the funds to the first and second respondents’ solicitors’ account but to no avail. The bank’s stance in my opinion came as no surprise at all as to whether the monies be paid to Portcullis Trustnet (Labuan) Ltd and then to the first and second respondents’ solicitors (as asserted by the petitioner) or to the first and second respondents’ solicitors’ account directly as requested by the first and second respondents’ solicitors. The reason is simple – it is trite law that orders and judgments of the court must be treated with respect and require strict obedience, until and unless set aside – *Wee Choo Keong v. MBf Holdings Bhd & Anor And Another Appeal* [1993] 3 CLJ 210; [1993] 2 MLJ 217 (Supreme Court). The bank was merely following the terms of the *Mareva* order to the letter.

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[43] The first and second respondents postulated that if at all there is a need to vary the terms of the post-judgment *Mareva* or seek clarification from court, the onus is on the alleged contemnor to do so. I see nothing in any of the orders before the court that entitled the first and second respondents’ invocation of such an argument.

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[44] In contempt proceedings, the applicants bear the burden of proving non-observance of the court order by the alleged contemnor beyond a reasonable doubt. A court order requiring compliance cannot form a basis of a charge of contempt if it makes no reference as to who is to take the further steps to remove the hurdles in the way whether to secure LSH’s certification (and if this is to be dispensed with), to vary the *Mareva* order which in my view is integral without which the bank cannot pay out the funds in the manner as requested by the parties. This requirement to me cannot be supplanted by the allegations and counter-allegations, conduct and/or correspondences of the parties as contained in exh. DC9 and DC10. This proverbial “elephant in the room” that no one can ignore, in the form

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A of the *Mareva* order is a critical factor that weighs heavily against the first and second respondents' case for committal. The *Mareva* order worded in clear language, free from any ambiguity, simply do not envisage payment to the first and second respondents' solicitors without a variation.

B [45] If a party has an effective and available recourse, the party should resort to that recourse instead of applying for leave to institute committal proceedings – *Tan Kang Ho (supra)*, at paras. 68 to 72.

C [46] Given the clear language of the *Mareva* order, in my view, it would be practical, relevant and meaningful for the applicants to vary it. Until the path is cleared for upliftment of the time deposits, any ambiguity as to who is to do what must admit of a conclusion that contempt is not made out. Put another way, it cannot be clearly said that the petitioner's disobedience of the encl. 198 order is deliberate, and intentional to undermine the authority of the court or calculated to interfere with the administration of justice. The benefit of doubt must be given to the petitioner.

D [47] In the circumstances, after anxious and careful scrutiny of the affidavits and submissions of the parties; more so as committal proceedings are *quasi-criminal* in nature and involves the liberty of the alleged contemnor, I am not satisfied that the first and second respondents' have failed to prove beyond reasonable doubt that the petitioner had committed the alleged acts of contempt.

E [48] If contempt beyond a reasonable doubt is not said to have been established, the committal application by the first and second respondents must fail.

F [49] For the forgoing reasons, the committal application was dismissed with no order as to costs. I ordered no costs because I find the petitioner does not deserve costs in the circumstances. The parties have litigated since 2006, and five years have passed since the consent order was entered into, with no end of litigation in sight as there is now the appeal. Charles Dicken's *Jarndyce v. Jarndyce* in Bleak House comes to mind – a suit which dragged “its weary length before the court” for generations until nothing was left for the parties.

G [50] I have not discussed each and every argument raised on behalf of the parties as I find no useful purpose will be served in arriving at a decision.

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